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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-1539.

KARL and HILDA HOPE,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY BRIEF FOR PETITIONERS.

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REPLY BRIEF FOR PETITIONERS.

This Reply Brief is not intended as a comprehensive rebuttal of all contentions raised by Respondent in its Brief In Opposition.

RESPONDENT'S QUESTION PRESENTED.

The Question As Presented By Respondent is incomplete and too limited. Further, it incorrectly states that there was an "* * * unsuccessful attempt to rescind the sale in that year [1960] * * *". Actually the suit for rescission was still pending at December 31, 1960.

RESPONDENT'S STATEMENT.

Respondent's Statement is both inadequate and redundant. Insofar as 1960 is concerned it fails to note various salient points such as the good faith on Karl Hope's part, conceded *inter alia* in open Court before the Third Circuit Court of Appeals. It is superfluous insofar as it concentrates on the events transpiring in 1961 are concerned, since the very essence of Respondent's "claim of right" position is that 1960 taxability may be determined only by 1960 events and may not be affected by subsequent events.

RESPONDENT'S ARGUMENT.

Respondent concurs with Petitioner that the claim of right doctrine is that "* * * funds which are received and *held* . . . under a claim of right are taxable in the year of receipt * * *" (Resp. Br. 5). Admittedly then Respondent agrees that the claim of right doctrine is not initially applicable unless funds are *both* so received *and held*.

Accordingly it is surprising to find the only bases which Respondent can find to distinguish the asserted conflict with *Sohio Corp. v. Commissioner*, 163 F. 2d 590 (D. C. Cir., 1947) are (1) that unlike *Sohio*, Hope asserted a claim of right at the time of initially receiving the sales proceeds; and (2) the patently erroneous statement that such initial claim "was never disclaimed" (Resp. Br. 6). Having conceded that the proceeds must not only be received but must also be *held* under a claim of right before the claim of right doctrine causing taxation at the close of the year is applicable in the first instance, how then can Respondent justify urging taxation only because there was no disclaimer at the moment of receipt?

It should be noted that at no time, prior to its Brief In Opposition before this Court, has Respondent specifically urged *Sohio* was distinguishable on the above ground.[1] Similarly, neither the Tax Court nor the Court of Appeals relied on this as the basis for distinguishing *Sohio*.

No case has held it pre-requisite to invoking the disclaimer exception to the claim of right doctrine that the taxpayer must have disclaimed at the very moment of receipt. Such a pre-requisite would virtually emasculate the exception, except in rare situations. Indeed, contrary to Respondent, the cases hold that it is sufficient if such disclaimer takes place before the end of the year of receipt and is still being maintained at the end of such year, *United States v. Merrill*, 211 F. 2d 297, 304 (9th Cir., 1954); *Gaddy v. Commissioner*, 344 F. 2d 460, 462 (5th Cir., 1963), aff'g (and quoting from) 38 T. C. 943, 948, 949 (1962); See, *Penn v. Robertson*, 115 F. 2d 167, 175 (4th Cir., 1940).

The decisions of the Courts below in *Hope* are not "entirely consistent" with and do not "follow *a fortiori*"

1. Although *Sohio* was extensively relied on by Petitioners in their original Tax Court Brief, Respondent totally omitted comment on the case in his Original and Reply Briefs.

rom *North American Oil Consolidated v. Burnet*, 286 U. S. 17 (1932) and *E. E. Healy v. Commissioner*, 345 U. S. 278 1953), as was asserted by Respondent (Br. 6). The general laim of right doctrine is a necessary tool to implement the nnual accounting doctrine which requires a determination f taxability as at the end of each year, *E. E. Healy v. ommissioner, supra.* However, the Supreme Court has oted in both cases that the potentially harsh effect of the ıvocation of the claim of right doctrine might at least be itigated by the allowance of a deduction in the year of epayment, *North American Oil Consolidated v. Burnet, upra; E. E. Healy v. Commissioner, supra.* In the *Hope* ase the Courts below have both held that the subsequent ear's recovery of the stock and return of the proceeds ould simply be a repurchase with no deduction allowable, ecause the commencement of the rescission suit was vol-ntary. Further, neither of these two Supreme Court ases involved a disclaimer and a tender back of the roceeds in the year of receipt.

The unsubstantial nature of the distinctions made by Respondent confirm the existence of the conflict and of the esirability of this Court granting certiorari. Moreover, it s striking that Respondent totally failed to comment upon he specific reasons asserted by Petitioners as to why the roper administration of the Federal Tax Laws required eview of the *Hope* case (Pet. For Cert., pp. 14, 15). These easons included questions of public policy, as well as a emonstration that the Respondent here was urging a posi-on to justify taxation of gain which was the opposite of he position espoused in his own Regulations dealing with he allowance of loss under identical circumstances. In-eed, Respondent has confirmed his inability to respond, nd, although these issues have repeatedly been raised by Petitioners, Respondent has always assiduously avoided

response in all his briefs hitherto filed and in his argument before the Court of Appeals.

CONCLUSION.

For the reasons given above and in the Petition For Writ of Certiorari, it is respectfully submitted that this Court should grant the petition for a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit.

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